United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1517

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In The

United States Court of Appeals

For The Second District

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Docket No. 74-1517

UNITED STATES OF AMERICA,

Appellee,

- against -

SALVATORE THOMAS BADALAMENTE
and HERBERT YAGID,

Appellants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF APPELLANT, BADALAMENTE

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TABLE OF CONTENTS

INDEX

TABLE OF AUTHORITIES

Statutes

Other Authorities

Rules

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
----------X

UNITED STATES OF AMERICA,

Appellee,

- against - Dkt. No. 74-1320

SALVATORE THOMAS BADALAMENTE and
HERBERT YAGID,

Appellants.

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BRIEF OF APPELLANT SALVATORE THOMAS BADALAMENTE

Preliminary Statement

This is an appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York on April 11, 1974. The district judge (Carter, J.) did not render a written opinion.

Statement of Issues Presented for Review

1. Was the evidence sufficient as a matter of law to support appellant's conviction for conspiracy

to transport forged or counterfeit securities in interstate and foreign commerce?

2. Was appellant denied the effective assistance of counsel due to conflict of interest?

3. Did the district court err in (a) sustaining the prosecutor's objection to relevant cross-examination of appellant's co-defendant; and (b) failing to define for the jury the legal issues raised as to appellant and to differentiate them from the defense being offered by his co-defendants?

Statement of the Case

The indictment below (6a), filed on May 21, 1973, charged appellant Salvatore Badalamente and six co-defendants with one count of conspiracy to transport, and one count of transportation of, counterfeited securities in interstate commerce, in

violation of 18 U.S.C. §§ 371 and 2314. Co-defendants Allen, Berardelli and Turi pleaded guilty in advance of trial, and the indictment against co-defendant Feeney was nolle prossed (3a-4a).

Trial as to Badalamente and the remaining co-defendants, Yagid and Stern, commenced on March 4, 1974. At the commencement of trial, the government's motion to dismiss the substantive count against Badalamente was granted (4a; Tr. of Mar. 4, 1974, p. 9). The conspiracy count against Badalamente and both counts against Yagid and Stern were submitted to the jury, and it returned a verdict finding each defendant guilty of each count on which he was charged. On April 11, 1974, the district court sentenced Badalamente to one year imprisonment on the count on which he was convicted (R.40; Tr. of Apr. 11, 1974). Notice of appeal on behalf of Badalamente was filed on the date of sentence, and Badalamente was continued on a $10,000 unsecured personal recognizance bond pending appeal. Notice of appeal on behalf of Yagid was filed on April 18, 1974; Stern did not appeal.

The Government's Case

The government's case showed the existence of a conspiracy to obtain a false or forged savings bank book, to transport such pass book to Europe for use as collateral for a bank loan, and to distribute the proceeds of such loan among the conspirators. The evidence absolutely failed to show Badalamente's knowledge of, and participation in, such conspiracy.

The government's principal witness at trial was a paid FBI informer named Herbert Olsberg. He testified that in February, 1973, he had met co-defendants Yagid and Stern in connection with a perfectly legitimate real estate transaction in New Jersey (T.Tr. 67-70). Subsequently, in March, 1973, in connection with this transaction, he had met Badalamente (T.Tr. 67,70). During the course of the real estate negotiations, on March 6, 1973, Yagid mentioned to Olsberg, in the absence of Badalamente, the existence of another deal, which would involve a

pass book to a fictitious bank account which could be collateralized (T.Tr. 70-73). A number of meetings and phone calls ensued in the next few days among Olsberg, Yagid, Stern, Allen, Berardelli and Feeney (T.Tr. 73-86). On several occasions during these meetings, Rush and Yagid referred to an unnamed partner "who sits across the river" who would share the expenses of the proposed venture (T.Tr. 77, 79-80, 82, 84, 230). On March 16, 1973, Olsberg and Yagid flew to Los Angeles in an attempt to obtain the pass book but were unsuccessful (T.Tr. 86-89). Further meetings and phone calls followed among Olsberg, Yagid, Stern, Berardelli, Allen and Turi (T.Tr. 89-103, 111-114).

On March 23, Yagid requested Olsberg to accompany him to Leo's Restaurant in Fort Lee, New Jersey in order to talk "to the man who sits across the river about the land deal and about the pass book deal" and that if the "man across the river" had any questions about the pass book deal, Yagid would do the talking (10a). Later that day, Olsberg and Yagid met with Badalamente at the restaurant and discussed the

New Jersey real estate transaction. According to Olsberg, the discussion then turned to the pass book deal, with Badalamente requesting Yagid to brief him on events since the Los Angeles trip and asking Olsberg if he thought the "deal was good". Yagid also allegedly explained to Badalamente plans "to retrieve the funds" through Florida and to drive them to New York (10a-13a;T.Tr. 124).

More meetings and phone calls followed among Olsberg, Yagid, Stern, and Berardelli (T.Tr. 118-136). On March 31, Olsberg and Yagid flew to Chicago to meet Turi and to obtain the pass book, but they were again unsuccessful (T.Tr. 138-143). Further meetings and phone calls ensued among Olsberg, Yagid, Berardelli and Turi (T.Tr. 143-151). On April 2, Olsberg met Turi at Newark Airport. Turi tore open the lining of his jacket and produced a certificate of deposit and a pass book, each in the amount of $943,000, together with a letter to a Swiss bank which Olsberg had instructed him to prepare. Turi was immediately arrested (T.Tr. 151-153).

Olsberg further testified that although, beginning in February, 1973, Yagid and Rush had referred to their alleged partner in connection with the land deal as "the man across the river" on March 20, in a tape recorded conversation, Olsberg and Berardelli had used this expression to identify Yagid, who resided in New Jersey (19a-24a;T.Tr. 270-272, 281). Olsberg further testified that when he went to Leo's Restaurant on March 23, Yagid had informed him that the meeting was in connection with the real estate transaction and that during the discussion, Badalamente had inquired "how the Los Angeles trip came out" (25a, 29a). Olsberg also testified that his only prior meeting with Badalamente was held in early March at the same restaurant and was entirely in connection with the land transaction, which was "absolutely, very legitimate" (36a-43a; T.Tr. 209).

Olsberg also testified that although he had been equipped with body tape recording devices on the occasion of meetings with Yagid on March 20 and 21, and although the March 23 meeting with Badalamente was

arranged several days in advance, he was not able to obtain such a device from the FBI in time to use it on March 23 (14a-19a, 30a-35a). Olsberg also admitted that he had an extensive criminal record (T.Tr. 64-66, 197-200, 205-206) and that the FBI had paid him rewards totalling $13,000 for his services as an informer, including $3,000 in the instant case, together with living expenses of approximately $1,000 per month, during the pendency of the case (T.Tr. 63, 221-226, 304-305, 309-311; see also T.Tr. 352-358).*

*Mr. Rao, counsel for Yagid and Stern and the partner of Badalamente's trial counsel Mr. Nigrone, repeatedly identified Badalamente with the entrapment defense of his clients during his cross examination of Olsberg (T.Tr. 264,303,305,306,307). Counsel for Badalamente did not object.

The government's other principal witness was co-defendant Allen. His testimony confirmed the existence of the conspiracy and the participation of Yagid and Stern, but did not implicate Badalamente in any manner (T.Tr. 314-336). The balance of the government's case consisted of testimony by FBI agents who participated in Turi's arrest (T.Tr. 27-44) and who conducted surveillance of several meetings among Olsberg, Yagid, Stern, Berardelli and Allen but not of the March 23 meeting involving Badalamente (T.Tr. 311-313, 336-352), together with various items of technical proof (T.Tr. 45-59). At the close of the government's case, the district court denied Badalamente's motion for a judgment of acquittal on the ground that a fair preponderance of the evidence had established his involvement (T.Tr. 358-360). *

*This was, of course, an improper legal standard to warrant submission of the case to the jury United States v. Taylor, 464 F.2d 240 (2d Cir. 1972); 2 Wright, Federal Practice & Procedure, §467 (1969).

The Defense Case

Badalamente called Angelo Cigolini, who testified that he was a builder in New Jersey and had known Badalamente on a business basis since 1966 or 1967; that in 1973, Badalamente had asked him if he was interested in purchasing real property in Vernon, New Jersey; that in connection with this transaction, he had met with Yagid and Olsberg; and that he did not know anything about Badalamente's involvement in a pass book deal with Yagid and Olsberg (T.Tr. 364-374). Counsel for Badalamente rested without calling any further witnesses (T.Tr. 374-375).

Yagid testified on his own behalf that he had met Olsberg in January 1973 when the latter was acting as an agent in seeking a developer for the New Jersey land and that in an attempt to obtain a finder's fee, Yagid had mentioned this proposed transaction to Badalamente, whom he had known for eight or ten months (T.Tr. 377-381). Yagid also testified that during the

course of the real estate negotiations between Olsberg and himself, he had mentioned the pass book deal, which he had learned of from Allen, and that Olsberg had importuned him with pleas of poverty and threats to call off the land transaction in order to gain an introduction to Allen, as a result of which Yagid agreed to arrange such a meeting (T.Tr. 387-400). Yagid admitted that he had participated in further discussions among Olsberg, Stern, Allen, Berardelli, and Turi, at which the full details of the illegal transaction were discussed, and that he had taken the trips to Los Angeles and Chicago, but said that he had done so only at Olsberg's insistence and in fear that the latter would call off the land transaction if Yagid did not participate (T.Tr. 400-476). Yagid also testified that after he saw law enforcement officers in the airport at Chicago, he told Olsberg that the pass book deal was off (T.Tr. 476-490).

With respect to the March 23 meeting at which Olsberg met Badalamente, Yagid testified that the entire subject matter of the conversation was the real

estate transaction and Olsberg's fears that the proposed developer was not going to go through with the deal, and that there was absolutely no mention of the pass book deal (T.Tr. 461-463, 514-517). Cross examination of Yagid by counsel for Badalamente was limited to the single question of whether the two men were partners in the pass book deal, as to which the government's objection was sustained (T.Tr. 496-497).

Counsel for Yagid rested without calling further witnesses. The court denied Badalamente's motion for judgment of acquittal based upon the entire case (T.Tr. 535).

The Summations and the Charge

The summation of Badalamente's trial counsel, Mr. Nigrone, occupies less than four pages of the trial transcript (T.Tr. 544-548). Counsel denied Badalamente's participation in the pass book transaction and that the latter subject ever came up at

the March 23 meeting; he also attacked Olsberg's credibility and the absence of any tape recording of the single meeting involving Badalamente. However, counsel did not in any way disassociate Badalamente from the entrapment-withdrawal defense being offered by his partner, Mr. Rao, on behalf of Yagid and Stern.

Mr. Rao, counsel for Yagid and Stern, argued that his clients had been entrapped and that they had withdrawn from the conspiracy after the trip to Chicago (T.Tr. 548-573). Mr. Rao repeatedly injected Badalamente's name in this argument without objection by Mr. Nigrone (T.Tr. 540, 553, 564, 571).

Counsel for the government gave a very brief exposition of his contention that Badalamente was involved in the conspiracy (T.Tr. 581-582). The balance of the trial assistant's argument consisted of a rebuttal of the entrapment-withdrawal defense, during the course of which he constantly involved Badalamente in that defense, without objection (T.Tr. 575, 577-578, 579, 586).

In its charge, the court instructed the jury on the defenses of withdrawal and entrapment raised by Yagid and Stern (85a-89a). However, the court did not advise the jury that the defense was not applicable to Badalamente and that his defense was non-participation in the conspiracy and lack of criminal knowledge.

Post-Verdict Proceedings

The jury's verdict was returned on March 8, 1974. Trial counsel for Badalamente made no motions to set aside the verdict or for a new trial within the seven day period provided by F.R.Cr.P. 29(c)and 33, nor did he seek an extension of time to make such motions within that period pursuant to such rules.

On April 10, 1974, Badalamente appeared before the district judge with his present counsel, who requested an extension of time to make such motions and that, in the interest of justice, such application be considered nunc pro tunc to the date of the verdict. In support of this application, counsel argued that at

trial, Badalamente had been denied the effective assistance of counsel in that there had been a conflict of interest between the two trial attorneys. Counsel further pointed out that because these grounds were not apparent on the face of the record, the district court should hold a hearing in order to conserve the judicial resources which would be entailed by a possible remand by this court. The government opposed the application on the ground that it was untimely and that the allegations of ineffective assistance of counsel due to conflict of interest could be made in this court on the present state of the record. The district court denied the application (Tr. of Apr. 10, 1974). On the following day, sentence was imposed and notice of appeal was filed. (Tr. of Apr. 11, 1974; R.41).

ARGUMENT

POINT ONE
THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR CONSPIRACY TO TRANSPORT FORGED OR COUNTERFEIT SECURITIES IN INTERSTATE AND FOREIGN COMMERCE

Construed, as it must be at this stage, in the light most favorable to the government, United States v. Barash, 412 F.2d 26,31 (2d Cir.), cert. denied, 396 U.S. 832 (1969), the evidence failed to establish Badalamente's membership in the conspiracy and his knowledge of its unlawful aims. Instead, while the evidence abundantly demonstrated the existence of the conspiracy and the guilt of Yagid, Stern, Allen, Berardelli and Turi, it showed merely that Badalamente had been a party to a perfectly legal real estate transaction among Yagid, Stern and Olsberg and that the subject of the passbook transaction, but not its illegality, came up in a extremely peripheral manner in a single meeting between Olsberg and Badalamente, which

was not tape recorded, as were most of the other meetings among the conspirators.

From the numerous conferences and telephone conversations that were held amongst Olsberg, Yagid, Stern, Allen, Berardelli, Feeney and Turi during March and April, 1973, the government founded Badalamente's membership in the conspiracy on the meeting of March 23, 1973 at Leo's Restaurant in New Jersey. Badalamente's guilt vel non must be determined from the sparse testimony concerning that encounter, and the numerous oblique references allegedly made by Yagid and Stern outside of Badalamente's presence to an unnamed partner "across the river" obviously cannot add anything to the legal sufficiency of the evidence against appellant.

Turning, then, to March 23, it is undisputed that the primary purpose of Olsberg's meeting with Yagid and Badalamente on that day was the discussion of the real estate transaction, which was "absolutely, very legitimate" (T. Tr. 209). Although a purchase contract had been entered into, the sale had not been consummated, and Olsberg, who was to receive a finder's

fee, was concerned. Badalamente, who knew Cigolini, the prospective purchaser, was asked by Olsberg to implement the contract (11a-12a, 36a-44a). According to Olsberg, after discussion of this matter, Badalamente asked Yagid about "the L.A. trip and any subsequent meetings", after which Yagid "brought him up to date on these meetings". Badalamente then asked Olsberg if the passbook deal "was good" and whether arrangements had been made "to retrieve the funds", after which Yagid explained to Badalamente "about the funds coming into Fort Pierce, Florida, and how Mr. Yagid would drive the funds back to New York". Olsberg then raised the subject of splitting the funds, and Badalamente allegedly stated that the subject would have to be deferred until the funds were retrieved and the expenses were itemized. Finally, Badalamente stated that he believed that Beradelli's uncle wanted to see the deal realized and that it would be a good one for "all of us". (12a-13a).

Even assuming, as we must, that the latter part of this conversation occurred (despite the fact that it was not tape recorded, as were most of the

other meetings here involved), it was insufficient to establish Badalamente's membership in the conspiracy because it failed to show his knowledge of the illegal aims of the conspiracy. Placing the most sinister connotation on this testimony, it showed only that Badalamente knew (a) that Yagid and Olsberg had been to Los Angeles; (b) that Berardelli called them back; (c) that Yagid and Olsberg had attended later meetings; (d) that the passbook deal was good; (e) that arrangements had been made to "retrieve" the funds through Florida and drive them to New York; (f) that the division of the funds would be decided upon after all expenses were paid; (g) that Berardelli's uncle wanted to see the deal go through; and (h) that it would be good for "all of us".

Initially, it must be observed that in denying Badalamente's motion for judgment of acquittal at the end of the government's case on the ground that "a fair preponderance of the evidence has established his involvement" (T. Tr. 360), the district judge applied the wrong legal standard.* In United States v Taylor, 464 F.2d 240 (2d Cir. 1972), this court very

clearly held that the "preponderance of the evidence" test set forth in United States v Feinberg, 140 F.2d 592, 594 (2d Cir.) cert. denied, 322 U.S. 726 (1944), had been overruled and that henceforth the "reasonable doubt" test should be employed.

*Although the court denied a renewal of the motion at the close of the entire case without articulating its grounds (T.Tr. 535), it is clear that the standard by which a judge is to be guided in passing upon such a motion is the same regardless of when it is made. 2 Wright, Federal Practice & Procedure, §467, p. 254 (1969).

Applying this proper standard to the proof, it was clear error for the district judge to deny Badalamente's motions for judgment of acquittal (T. Tr. 358-60, 535). There were, in the classic language quoted in Taylor, not enough "facts in evidence" as to Badalamente to allow a jury of ordinary reason and fairness to affirm beyond a reasonable doubt appellant's membership in the conspiracy. Neither in their totality nor in isolation were the "facts in evidence" as to Badalamente sufficient to show his knowing participation in the conspiracy to transport a counterfeit passbook in interstate and foreign commerce. And nothing in the evidence presented by Badalamente, which consisted only of the innocous testimony of Cigolini (T.Tr. 364-374), remedied the defects in the government's proof within the rule in United States v Calderon, 348 U.S. 160,164 (1954): United States v Goldstein, 168 F.2d 666,668-71 (2d Cir. 1948), and their progeny.

It is, of course, commonplace that a conspiracy to commit a particular substantive crime cannot exist without at least the degree of criminal

intent necessary to commit the substantive offense itself. See, e.g., Ingram v United States, 360 U.S. 672, 678 (1959); United States v Farr, 487 F. 2d 1023 (2d Cir. 1973); United States v Alsondo, 486 F.2d 1339 (2d Cir. 1973); United States v Hysohion, 448 F.2d 343,347 (2d Cir. 1971); United States v Gallishaw, 428 F.2d 760, 763 (2d Cir. 1970) and cases cited therein. Count 1 of the indictment herein (6a-8a), of which alone* Badalamente stands convicted, charged a conspiracy to violate 18 U.S.C. § 2314 by causing forged and counterfeit securities to be transported in interstate and foreign commerce.

*Count 2 of the indictment, charging the substantive offense, was dismissed as to Badalamente on the government's motion at the opening of the trial (4a;Tr. of Mar. 4, 1974, p.9).

It is also well settled that a conviction of the portion of the statute proscribing interstate and foreign transportation of forged or counterfeit securities requires specific evidence of intent, i.e., proof of knowledge of the illegal character of the securities. United States v Braverman, 376 F.2d 249, 252 (2d Cir.), cert. denied, 389 U.S. 885 (1967). Thus, in the instant case, to sustain its burden of proof against Badalamente, it was necessary for the government to show that he had knowledge of the fact that the passbook was forged or counterfeit.

This was no evidence, nor any evidence from which an inference could be drawn, to support this indispensible element of the crime. Nowhere in Olsberg's testimony was there any evidence, direct or circumstantial, that Baladamente knew that the passbook was fraudulent and that the transaction was not legitimate. From aught that appears in the record, the transaction could have appeared to Badalamente as a perfectly legal one involving a valid security interest in a passbook. Even the discussion about "retrieval" of the funds by driving them from Florida to New York

is insufficient character of the passbook. While admittedly a bizarre way to transact business, such plans may have appeared to Badalamente as necessary to circumvent foreign currency export restrictions or even as a tax avoidance device. Certainly, the plans to "retrieve" the funds, while unusual, cannot without more evidence, and there is none, bring home to Badalamente the specific knowledge of the forged or counterfeit character of the passbook which was necessary to support his conspiracy conviction.

This case is the mirror image of the factual pattern which, in United States v. Infanti, 474 F.2d 522(2d Cor.1973) , required reversal as to appellant Kurtz because of insufficiency of the evidence. There, the evidence showed that Kurtz had accompanied Infanti on a trip to Europe and was present at negotiations for the sale of the stolen securities. This court stressed that there was neither actual nor constructive possession of the securities by Kurtz, and that there was no evidence that he could set the sale price or determine their means of delivery. The court specifically noted that while the circumstances of the

proposed stock transfer were "surreptitious" and that it should have been obvious to Kurtz that the transaction was "less than legitimate", this did not "establish the conclusion beyond a reasonable doubt that he was aware that the securities were stolen". 474 F.2d at 526. In language that is strikingly relevant to the instant case, this court thus held,

> "Without some further evidence of the quality of his participation, Kurtz's presence where illegal activity was being transacted does not establish his knowledge of the nature of the activity." 474 F. 2d at 526.

In Infanti, the conspiracy count against Kurtz was dismissed and an aiding and abetting charge withdrawn below; the conviction on the substantive offense only was before the court. Here, the substantive count was dismissed below and the conspiracy charge only is before this court. But that is of no moment, because if the facts there were

insufficient to support Kurtz' substantive conviction, the facts in the instant case, which are even more meagre, are insufficient to support Badalamente's conspiracy conviction. In the instant case, unlike Infanti, Badalamente did not accompany any of the co-conspirators on the trips which occurred during the life of conspiracy, and the proof of his participation in the conversation at Leo's Restaurant on March 23 is at least as equivocal as the proof of Kurtz' participation in the negotiations held in Frankfurt for the disposal of the securities. As in Infanti, there was no proof that Badalamente ever had actual or constructive possession of the forged passbook, and there was no proof that he could set the price for its disposal, that he had the "final say" as to the passbook's means of transfer or could assure its delivery. In short, in the instant case, as in Infanti, the sparse testimony of Badalamente's presence at Leo's Restaurant on March 23 and the conversation allegedly held there among Olsberg, Yagid and Badalamente "do not establish the conclusion beyond a

reasonable doubt that he was aware" that the passbook was forged or counterfeit.

Other recent cases decided by this court on sufficiency of the evidence in violations of Section 2314 do not dilute the force of the present argument. In United States v Brawer, 482 F.2d 117 (2d Cir. 1973), the court applied principle of Wilson v United States, 162 U.S. 613, 619 (1896) that recent possession of the fruits of crime justifies a prima facie inference of guilty possession. Dealing primarily with the evidence against the one appellant as to whom the question was "close", the court found that innocent possession by him was rebutted by his action in concealing the identity of his principal, by closing his eyes to mounting evidence of the bogus character of the bills and by acting in "reckless disregard" of their character in order to avoid learning the truth. In the instant case, unlike Brawer, there was no actual or constructive possession by Badalamente and the Wilson rule is therefore inapplicable. Nor was there any evidence that Badalamente had acted in a suspicious manner, that he had "closed his eyes" to avoid knowing

whether the passbook was forged or counterfeit, or that he had acted in "reckless disregard" of such fact with a conscious purpose to avoid learning the truth.

Similarly, in United States v. Jacobs, 475 F.2d 270, 280 (2d Cir.), cert. denied, 414 U.S. 821 (1973), the court sustained the convictions by application of the Wilson principle. There, each appellant had possession of the stolen securities, and their claims of innocent possession were rebutted by the large discounts contemplated in the resale, the false documentation used, and the fact that other persons had become suspicious of the transaction and had so advised appellants. In the instant case, of course, there was no actual or constructive possession of the passbook by Badalamente, and thus the Wilson rule was inapposite to raise a prima facie inference of guilt. In addition, none of the other factors which the court relied upon in finding guilty knowledge on the part of the appellants in Jacobs are present here even in the remotest form.

That the Brawer and Jacobs cases, resting on an application of the Wilson rule, are completely

inapplicable to the instant case is well illustrated by the decision in United States v Vilhotti, 452 F.2d 1186 (2d Cir. 1971), cert. denied, 405 U.S. 1041 (1972). That case involved a conviction for conspiracy and substantive violations of the stolen property statue, 18 U.S.C. § 659, which is analogous to Section 2314. There, this court reversed convictions against two appellants based merely on their presence in the same place as the stolen property at the time of the arrest. The court held that in the absence of evidence that these appellants exercised dominion and control over the property or knew that it was stolen, their mere presence at the scene was insufficient to establish possession. Since Vilhotti stands for the proposition that innocent presence without more is insufficient to support actual or constructive possession of stolen property, it is true a fortiori that the Wilson rule cannot be stretched to sustain an inference of guilty knowledge by Badalamente when there was no showing that the passbook was ever in his physical presence or that he exercised dominion or control over it.

The facts in United States v. Mingoia, 424 F.2d 710 (2d Cir. 1970) are also quite distinguishable from the instant case. Mingoia also involved a conspiracy to violate Section 2314, the appellant who alleged insufficiency of the evidence having been acquitted on the substantive offense. The court noted that a co-conspirator had testified to two discussions with this appellant, during which the source and the distribution of the stolen checks was discussed.* On these facts, it was held that the evidence was sufficient. In the instant case, there was not an iota of testimony that anyone at the March 23 meeting ever said that the passbook was forged or counterfeit or in any way fraudulent. Mingoia is thus distinguishable on its facts.

*"Negri stated that they discussed whether the group who stole the first batch of checks should receive payment before they delivered additional checks, and that everyone, including Mingoia injected something into the conversation". 424 F.2d at 711. This evidence contrasts starkly with the testimony of Olsberg regarding the March 23 meeting (12a-13a).

The mere fact that the passbook conspiracy may have been discussed on March 23 by Yagid and Olsberg in Badalamente's presence is, of course, insufficient proof to show the latter's membership in the conspiracy. Compare, United States v Steward, 451 F.2d 1203 (2d Cir. 1971). Even knowledge of the existence of the conspiracy and its goals, without proof of "a stake in the outcome" is insufficient to sustain a conviction. United States v. Cianchetti, 315 F. 2d 584, 587-588 (2d Cir. 1963). Here, as in that case, the statements attributed to Badalamente are "at least equivocal" and demonstrate that "[h]e did not cast in his lot with the conspirators, did nothing to further the success of the enterprise, and had no stake in its outcome." 315 F.2d at 388. The few comments attributed to Badalamente in Olsberg's testimony were analogous to those found to be "hypothetical comment" and thus "too slight to submit to the jury" in United States v Stromberg, 268 F.2d 256, 267 (2d Cir.), cert. denied, 361 U.S. 863 (1959). See also United States v Bufalino, 285 F.2d 408, 414-416 (2d Cir. 1960). None of Badalamente's comments on March 23 (12a-13a)

indicate anything more than a passing interest in the passbook transaction and the hope that it would "go through" and "be a good deal for all of us".

Thus, taken in its strongest aspect, the evidence absolutely failed to show the specific knowledge on the part of Badalamente required to prove his membership in the conspiracy. It was not enough to show by vague insinuation that Badalamente must have been Yagid's partner in the deal since they had dealt with Olsberg in the real estate transaction. It was necessary to show that Badalamente was privy to the discussion regarding the plans of the conspirators to obtain a passbook to a fictitious bank account and to use forged documents to obtain a Swiss bank loan on the account. This, the evidence failed to prove and the sparse testimony of Olsberg regarding the March 23 meeting is insufficient to establish these elements. To the contrary, according to Olsberg, Badalamente twice mentioned that the transaction was "good" which certainly casts doubt upon the latter's knowledge of its fraudulent nature.

Because the evidence failed to show the specific intent required by Section 2314, knowledge of the forged or counterfeit character of the passbook, a conviction of a substantive violation of that section could not stand. Thus, Badalamente's conviction of conspiracy to violate that section must fall. The judgment should therefore be reversed with instructions to dismiss the indictment as to appellant.

POINT TWO

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO CONFLICT OF INTEREST.

Shortly after arraignment, notices of appearance were filed on behalf of Yagid and Stern by Paul Rao, Esq. and on behalf of Turi and Badalamente by Salvatore Nigrone, Esq. (R.11 & 12). These notices listed both attorneys at the same address and with nearly consecutive phone numbers (2a). In pretrial proceedings, Mr. Nigrone twice referred to Mr. Rao as "an associate of mine" and "my associate" and the government referred to the latter as "his partner". (Tr. of August 3, 1973, p. 2; Tr. of Nov. 12, 1973, p. 9; Tr. of Feb. 1, 1974, p. 2). Never during the five pretrial proceedings held in this matter between the service and filing of the two notices of appearance on June 13, 1973 and the commencement of the trial on March 4, 1974, did either the government or the district judge raise the question of a possible conflict of interest among the four defendants and their two closely related attorneys. Finally, just

before selection of the jury, the court summoned Mr. Rao to the side bar and inquired of him, in the absence of the defendants, whether there was any conflict as to his representation of Yagid and Stern, to which Mr. Rao replied in the negative. (Tr. of Mar. 4, 1974, p. 2). The district court made no inquiry of Mr. Nigrone as to the existence of any conflict of interest between his representation of Turi, who had previously pleaded guilty (Tr. of Nov. 12, 1973), and Badalamente, or between the two counsel arising out of their office affiliation, and whether the three defendants on trial would present conflicting defenses.

After the verdict but before sentencing, Badalamente retained his present counsel, who promptly appeared before the district court to request an adjournment of the sentence, scheduled for the following day, in order to permit preparation of formal motions to set aside the verdict because of insufficiency of the evidence and for a new trial on the ground of conflict of interest among Messrs. Rao and Nigrone and their four clients. Counsel requested

that such motions be considered as having been made nunc pro tunc to the date of the verdict. The government opposed the application as untimely and argued that the conflict of interest issue could be determined by this court on the present state of the record. Defense counsel replied that because the latter question might not be apparent on the face of the record, this court would be constrained to remand for an evidentiary hearing and that it would be more orderly procedure for the district court to hear and rule on the issue in the first instance. The district judge remarked that he had raised the question of conflict with Mr. Rao and that neither Mr. Nigrone nor Badalamente had raised any question at that time. Accordingly, the application to adjourn the sentence was denied (Tr. of Apr. 10, 1974). On the following day, sentence was imposed (Tr. of Apr. 11, 1974) and this appeal taken (R. 41). The government is therefore estopped to argue that the conflict of interest issue is not properly presented to this court.

It is appellant's position that, in the circumstances of this case, the representation of four defendants by two lawyers engaged in a common practice deprived him of his Sixth Amendment right to the "untrammeled and unimpaired" and "undivided assistance of his counsel", "[i]rrespective of any conflict of interest", and that the district judge erred in not "jealously guarding" that right and in not fulfilling the "duty of seeing that the trial is conducted with solicitude for the essential rights of the accused". Glasser v United States, 315 U.S. 60, 70,76,75,71 (1942). Despite these august pronouncements, so frequent are situations of conflict of interest among defense counsel in criminal cases that this court has imposed a requirement on the trial judge of "conducting the most careful inquiry, as to which a full record should be made...that no conflict of interest is likely to result and that the parties involved have no valid objection". Morgan v United States, 396 F. 2d 110,114 (2d Cir. 1968). In such an inquiry, the trial court must "determine whether there exists a conflict of interest...such that the defendant will be prevented

from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment." United States v Alberti, 470 F.2d 878,881-882 (2d Cir. 1972),cert. denied, 411 U.S. 919,965 (1973). The duty to conduct such an inquiry arises from "[t]he very fact that two or more co-defendants are represented by the same counsel" and should focus on "whether the defenses to be presented in any way conflict". United States v Lovano, 420 F.2d 769,772 (2d Cir.), cert. denied, 397 U.S. 1071 (1970). At such a hearing, "the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views." United States v Alberti, supra, 470 F.2d at 882. The duty to conduct such an inquiry arises "as early in the litigation as possible", United States v Foster, 469 F. 2d 1, 4 (1st Cir. 1972), and is an affirmative obligation. Campbell v United States, 352 F.2d 359, 360 (D.C. Cir. 1965). Such a hearing be held regardless of whether trial counsel is privately retained rather than court appointed. United States v Alberti, supra, 470 F. 2d

at 881; United States, v Lovano, supra, 420 F. 2d at 773, n.12. In an appropriate case the trial judge should allow counsel to withdraw, United States v Press, 336 F. 2d 1003, 1017 (2d Cir. 1964), cert. denied, 379 U.S. 965 (1965), and has the discretion to require the defendant to obtain other counsel. United States v Kaufman, 429 F.2d 240,247 (2d Cir.), cert. denied, 400 U.S. 925 (1970).

The district judge absolutely failed to perceive his responsibility to inquire as to the existence of any conflict of interest arising out of Mr. Nigrone's representation of Turi and Badalamente and the close association between the former and Mr. Rao, who was also representing two defendants, and to determine whether Badalamente was fully apprised of the situation and had an opportunity to state his views. Not until the moment of trial, after lengthy pretrial proceedings, did the court inquire of Mr. Rao, outside of Badalamente's presence, as to the possibility of a conflict between Yagid and Stern. This colloquy, almost an afterthought, was grossly insufficient to protect Badalamente's interests.

It cannot be said that the failure to present the situation to the court was due to an inadvertent oversight on the part of the government. It well knew the facts relating to the professional affiliation between Messrs. Rao and Nigrone, and it failed to request the court to take any action. In the present circumstances, given the lack of a satisfactory inquiry, the burden of demonstrating the absence of prejudice shifts to the government.* United States v De Berry, 487 F. 2d 448, 453-54, n. 6 (2d Cir. 1973), citing United States v Foster, supra, 469 F. 2d at 5; compare, Ford v United States, 379 F.2d 123 (D.C. Cir. 1967); Lollar v United States, 376 F. 2d 243 (D.C. Cir. 1967).

*In such a situation, De Berry, infra, apparently overrules earlier holdings that the existence of actual prejudice must be shown to warrant reversal. See United States v Goldberg, 401 F.2d 644,648 (2d Cir. 1968), cert. denied, 393 U.S. 1099 (1969); United States v Paz-Sierra, 367 F.2d 930,932 (2d Cir. 1966), cert. denied, 386 U.S. 935 (1967); United States v Dardi, 330 F.2d 316,335 (2d Cir.), cert. denied, 379 U.S. 845 (1964); United States v Bentvena, 319 F.2d 916, 937 (2d Cir.), cert. denied, 375 U.S. 940 (1963).

But reversal need not rest upon the absence of inquiry by the court and the government's anticipated assertion, in lieu of sustaining its burden of proof, that there was no prejudice to Badalamente arising from the dual counsel-four defendant arrangement. There was abundant prejudice arising out of the inconsistency of the defenses being offered by Yagid and Stern, on the one hand, and Badalamente, on the other; the fact that Yagid testified and Badalamente did not; the disparity in the evidence between Yagid and Stern, as opposed to Badalamente; and the fact that Turi might have been a helpful witness to Badalamente.

Considering these indicia of prejudice in order, then, there was an obvious divergence of interests between the entrapment-withdrawal defense offered by Yagid and Stern and the defense of non-participation offered by Badalamente. The former defense is basically one of confession and avoidance, and is understandably regarded with some suspicion by jurors. The defense of lack of involvement is a much

more straightforward one, and can be more fully appreciated by the lay mind. But the appealing quality of such a defense can be easily tarnished by comparison with an entrapment defense.

In such a situation, astute counsel who represents the denying defendant must labor mightily to disassociate himself from the entrapment defense, carrying as it does an outright admission of participation. So true is this that this court recently noted in an analogous context that the denial of a motion to sever presented a "close question". United States v Barrera, 486 F.2d 333,339 (2d Cir. 1973). Yet Mr. Nigrone absolutely failed to seek a severance when the character of the defense to be presented by Mr. Rao must have been known to him; nor did he at any point in the trial seek to distinguish his client from the defense being offered by his colleague.

In view of the fact that he was an attorney, the entrapment-withdrawal defense of Yagid was at best

a difficult one, and strong measures were necessary to protect Badalamente from its prejudicial impact. Yet, Mr. Nigrone's cross examination of Yagid was limited to a single question, as to which the court erroneously sustained an objection (T.Tr. 496-497), see Point Three (A) hereof; Mr. Nigrone's summation (T.Tr. 544-548) was grossly inadequate to present to the jury the differences in the defenses being offered; Mr. Nigrone failed to request the court to instruct the jury on the precise legal issues presented as to his client, see Point Three (B) hereof; and Mr. Nigrone sat by without objection when, during Mr. Rao's cross examination of Olsberg (T.Tr.264,303,305,306,307)and summations of both Mr. Rao and government counsel (T.Tr. 540, 553, 564, 571, 575,577-578,579,586), Badalamente's name was involved in the entrapment-withdrawal defense.

In the absence of the evidentiary hearing requested after the verdict by Badalamente's new counsel, this court can only speculate on Mr. Nigrone's reasons for acting as he did. It can, however, be said with firm assurance that the conduct of the trial below

has resulted in a grave miscarriage of justice as to Badalamente. In a case such as the present one, where divergent interests exist between defendants which render counsel impotent to assist effectively one client by reason of the necessity of protecting the other, the mere possibility of harm is sufficient to render a resulting conviction invalid. Sawyer v Brough, 358 F. 2d 70,73 (4th Cir. 1966). But here, the prejudice was actual, and not potential. It was every bit as real as that found to require reversal in De Berry, supra. So, too, the possibility of harm arising out of Mr. Nigrone's divided loyalties among Badalamente, Turi and the other two clients of his office may have worked to the detriment of Badalamente and requires a new trial. United States v Olsen, 453 F. 2d 612, 616 (2d Cir.),400 U.S. 927 (1972).

Prejudice is also apparent from the fact that Yagid testified in his own behalf and Badalamente did not. Here, although Yagid did not incriminate Badalamente, the former's exculpatory testimony concerning Badalamente's participation in the March 23 meeting, taken in light of the nature of the balance of

such testimony, may have been skeptically regarded by the jury in the absence of testimony by Badalamente himself. Put another way, if, as it did, the jury disbelieved Yagid's testimony as to his entrapment and subsequent withdrawal, it probably equally disbelieved his testimony about Badalamente's non-participation. Without an opportunity to appraise personally Badalamente's version of the facts, the jury was forced to rely on Yagid's, which it found self-serving and disregarded.

Here, Badalamente was prejudiced by the fact that where two defendants are represented by the same counsel and one elects to testify and the other does not, the possible prejudice in the eyes of the jury is almost inescapable. Morgan v United States, supra, 396 F. 2d at 114. Here, also, as a result of the conflict of interest, Mr. Nigrone was prevented from proper cross-examination of Yagid, his partner's client, as a result of which the quality of representation was impaired and a new trial is

required. Craig v United States, 217 F.2d 355,359 (6th Cir. 1954).

It will undoubtedly be argued that the conflict of interest here presented is exactly that found to be non-prejudicial in Lovano, supra. But of course, the facts in that case are distinguishable because the two defendants as to whom the conflict was there urged "were involved in completely different aspects of the conspiracy", the part of one not having begun until three days after the other disappeared from the scene. 420 F.2d at 774. Here, however, Yagid was an acknowledged member of the conspiracy on the date of the March 23 meeting, and his testimony as to Badalamente's participation was of vital significance to the latter's guilt or innocence. As the Lovano court recognized, the argument of conflict of interest has merit where the relationship between the defendants is such that the defendant claiming entrapment could have implicated the other or the latter could have proved that the former played a greater role in the scheme than he claimed. This is precisely the

of course in a position to implicate Badalamente, and Badalamente was potentially able to show that Yagid's role in the scheme was greater than claimed.

Again, one can only speculate on Mr. Nigrone's reasons for advising Badalamente not to testify. But the possibility of a trade-off, whereby Yagid agreed not to implicate Badalamente if the latter did not testify in his own behalf, cannot be discounted. That is to say, Mr. Nigrone may have succumbed to the temptation to avoid hurting his partner's client by not putting his own client on the stand.

Prejudice is also shown by the disparity in the proof as between Yagid and Stern, on the one hand, and Badalamente on the other. While even a marked difference in the degree of proof against jointly represented defendants is in itself insufficient to establish a claim of inadequate representation, United States ex rel. Ross v La Vallee, 448 F. 2d 552, 555 (2d Cir. 1971), the question should be regarded in terms of the harmless error doctrine. Thus, given the

possibility of a conflict of interest, its impact must be considered in light of the weight of the evidence against an appellant claiming prejudice and the possibility that the conflict may have affected the result. In the instant case, as has already been shown, the case against Badalamente was paper thin. There is every reason to believe that if Badalamente had been afforded counsel of undivided loyalty and who was untrammelled by a conflict of interest between his two clients and those of his partner, appellant would not be before this court. Thus, in view of the exceedingly narrow case against Badalamente, which is here contended to be insufficient as a matter of law, it cannot be said that the possible conflict of interest was harmless error.

There is also a manifestation of prejudice arising out of Mr. Nigrone's joint representation of Turi and Badalamente. Turi may well have been in a position to exculpate Badalamente, but Mr. Nigrone may have been reluctant to allow Turi to testify because of the possible effect on his then-pending sentence. While this court dismissed such an argument in Lovano

as "mere speculation", 420 F.2d at 774, here it has more substance. Turi pleaded guilty on November 12, 1973 and on April 16, 1974, after Badalamente's sentence, was given a two year suspended sentence and placed on probation for such period (Tr. of Nov. 12, 1973 and Apr. 16, 1974). Following Turi's sentence, the court placed a confidential envelope regarding him under seal (5a). Quite obviously, this document related to the subject of Turi's cooperation which warranted leniency in his case, as opposed to the prison sentence imposed on Badalamente. In these circumstances, there was an obvious conflict of interest presented by Mr. Nigrone's representation of a cooperating defendant who was unsentenced at the time of the trial below, who did not testify for either side and who in fact received a significantly more lenient sentence than Badalamente. The dangers of an adverse effect on Badalamente's representation at trial arising out of Mr. Nigrone's representation of Turi, who was effectively muzzled from testifying, are immediately apparent.

There are other manifestations of prejudice which may have grown out of the conflict of interest situation or may have resulted from trial counsel's inexperience or from other personal considerations. Mr. Nigrone failed to object to several adjournments of the trial date. During the course of the delay, a potential witness to the March 23 meeting, Jimmy Galenti, died (10a). Mr. Nigrone did not explore the possibility that the denial of a speedy trial may have deprived Badalamente of the right to call Galenti as a defense witness. This was crucial evidence, since the March 23 meeting was the only testimony which implicated Badalamente in the conspiracy.

Secondly, well before trial Mr. Nigrone sought and obtained a court order for the production of psychiatric and court records of Olsberg for possible use as impeachment material (Tr. of Jan. 2, 1974, p. 6-7; Tr. of Feb. 1, 1974, p. 9-10; R.35). When these files had not been received by the commencement of trial, Mr. Nigrone so advised the court, but failed to request it to grant a continuance or to take action to

enforce its order, and the matter was apparently allowed to rest there (Tr. of Mar. 4, 1974, p. 15-16). In view of the fact that Olsberg was the sole witness to implicate Badalamente, and assessment of his credibility was a vital issue, it cannot be gainsaid that the failure to obtain these records substantially prejudiced appellant.

Third, following the rendition of the jury's verdict, Mr. Nigrone failed to make motions to set aside the verdict or for a new trial, and failed to ask the court to extend the time for making such motions within the seven day period provided by F.R. Cr. P. 29(c) and 33. As a result, when Badalamente retained new counsel shortly before the sentence, the court held that any such motions were untimely (Tr. of Apr. 10, 1974, p. 6).

Thus far, the existence of a conflict of interest has largely been regarded from the standpoint of joint representation of co-defendants by a single attorney. The question of whether a conflict of

interest arises out of joint representation of several co-defendants by two members of the same law office appears to be one of first impression in this court or any other circuit. In one recent district court decision rendered by a present member of this court, it was held that the representation of two co-defendants by members of the same firm did not ipso facto establish a conflict of interest. United States v Tropiano, 323 F. Supp. 964 (D.C. 1971). In that case, however, the defendant complained of the action of his co-defendant's counsel in advising the co-defendant not to testify. The court held that the Sixth Amendment did not guarantee the defendant the right to have his co-defendant represented by someone acceptable to him. In effect, the court rejected the claim because of lack of standing and the absence of prejudice. In the instant case, Badalamente's standing to raise the conflict between Messrs. Rao and Nigrone is unchallengable and the prejudice has already been demonstrated.

The absence of relevant federal case law does not, however, indicate that the question of whether, in

the present circumstances, there is a conflict of interest is in doubt. There is abundant and well respected authority for the proposition that the injunction not to represent conflicting interests applies equally to law partners and to those who merely have offices together. Drinker, Legal Ethics 106 (1953).

As long ago as 1931, the Committee on Professional Ethics of the American Bar Association held that the relations of partners in a law firm are so close that all of its partners are barred from accepting any employment that any one member of the firm is prohibited from taking. ABA, Comm. on Prof. Ethics, Formal Opin. 33, Mar. 2, 1931, reprinted in ABA, Opinions on Prof. Ethics 277 (1967). This reasoning has been extended to attorneys who share office space together. ABA, Comm. on Prof. Ethics, Informal Opin. 995, Jul. 3, 1967, reprinted in ABA, Informal Opinions (undated paperback). These opinions have been implemented in the newly adopted Code of Professional Responsibility, which states that a lawyer shall not accept or continue multiple client employment

if his independent professional judgment is likely to be adversely affected, in which event no partner or associate of his or his firm may accept or continue such employment. ABA, Code of Prof. Resp., DR 5-105(A), (B), (D).

Additionally, the ABA Project on Standards for Criminal Justice has dealt with the precise issue here presented and held that lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one may conflict with the duty to another, and that the potential for conflict is so grave that ordinarily a lawyer should decline such multiple employment except in unusual situations after careful investigation and informed consent by the clients. ABA, The Defense Function, Stand. 3.5(b) (Approved Draft, 1971). In a Commentary to this Standard, it is noted that the problem of representation of co-defendants by two or more lawyers associated in practice "is really not different from the problem of one lawyer representing

multiple defendants", and that both situations should be eschewed. Ibid, Commentary (b), at 214.

It is the clear import of the foregoing authority that if Mr. Rao was disqualified from representing Badalamente, Mr. Nigrone was equally barred. That there would be a conflict arising between Mr. Rao's representation of Yagid, Stern and Badalamente is apparent from the holdings of the cases cited above. The situation is no different with respect to Mr. Nigrone's representation of Badalamente where his partner would be disqualified and is compounded by the former's representation of Turi. Here, the prejudice arising from representation of multiple defendants by a single attorney is applicable a fortiori to quadrapite representaiton by two members of the same firm.

Thus, the joint representation of four defendants by two lawyers who share a common practice has been shown to be highly prejudicial to Badalamente's interests and in direct conflict with

this court's recent decisions and the ethical precepts which govern the legal profession. The district court absolutely failed to observe its duty of jealously guarding Badalamente's rights as required by Glasser and to fulfill its duty to inquire as to the existence of a conflict of interest as mandated by Morgan, Lovano and Alberti. Under the decision in De Berry, the trial court's failure to conduct such an inquiry shifts the burden of showing the absence of prejudice to the government. Under the holdings in Olsen and DeBerry, prejudice is here present and reversal is required. However, despite the government's concession below that the facts are adequately shown by the present state of the record, this court may wish to remand the case to the district court to hold a hearing under authority of Morgan, supra, and Butzman v United States, 205 F.2d 343.351 (6th Cir.), cert. denied, 346 U.S. 828 (1953). See also Lovano, supra; and United States v. Sheiner, 410 F.2d 337, 341 (2d Cir.) cert. denied, 396 U.S. 825,829 (1969), where hearings were held below.

Therefore, even if this court should hold that the evidence was legally sufficient to sustain the jury's verdict, the conviction should be reversed for a new trial because the conflict of interest situation here presented denied appellant the adequate assistance of counsel. Alternatively, the cause should be remanded for a hearing to develop a fuller factual record on the existence and effect of the conflict of interest, and this court should retain jurisdiction pending such hearing.

POINT THREE

THE DISTRICT COURT ERRED IN (A) SUSTAINING THE PROSECUTOR'S OBJECTION TO RELEVANT CROSS EXAMINATION OF APPELLANT'S CO-DEFENDANT; AND (B) FAILING TO DEFINE FOR THE JURY THE LEGAL ISSUES RAISED AS TO APPELLANT AND TO DIFFERENTIATE THEM FROM THE DEFENSE BEING OFFERED BY HIS CO-DEFENDANTS

The district court committed two errors which, taken together with the claim of inadequate assistance of counsel, require the granting of a new trial. Both of these errors can be inferred to be a product of the conflict of interest issue argued in Point Two hereof and should be considered in connection therewith.*

*Appellant also adopts and incorporates by reference pursuant to F.R.A.P. 28(i), the anticipated argument of Yagid that the district court's failure to charge that the testimony of the informer, Olsberg, should be weighed with greater care than that of an ordinary witness. In his request No. 9, Mr. Nigrone had requested such an instruction pursuant to United States v Masino, 275 F.2d 129,133 (2d Cir. 1960). Although the court indicated that it would give the requested instruction (T.Tr. 537), its charge on the subject (66a-67a) was legally inadequate. Since the testimony of Olsberg alone implicated Badalamente, the failure to give a proper instruction was prejudicial error as to him.

A. The District Court Erroneously Restricted Relevant and Material Cross Examination of a Co-Defendant.

After Yagid's direct testimony, Mr. Nigrone cross examined him on behalf of Badalamente. The following is the entire substance of such examination:

> Q. Mr. Yagid, was Sam Badalamente your partner in the bankbook deal?
>
> MR. EBERHARDT: Objection.
>
> THE COURT: Objection sustained.
>
> MR. NIGRONE: I have no questions. (T.Tr. 496-497).

It was reversible error to sustain this objection and it deprived appellant of his constitutional right to cross examine a witness as to relevant and material facts.

It is well settled that reasonable latitude is to be given to the cross-examiner, even though he is unable to state what facts a reasonable cross examination might develop and that prejudicial error ensues from the unreasonable denial of this right. Alford v United States, 282 U.S. 687,692 (1931). Curtailment of cross examination which keeps from the jury relevant and important facts, bearing on the trustworthiness of crucial testimony is in itself a sufficient ground for reversal. Gordon v United States, 344 U.S. 414,423 (1953). The right of adequate cross examination designed to expose falsehood and to bring out the truth is a fundamental right guaranteed by the confrontation clause of the Sixth Amendment. Pointer v Texas, 380 U.S. 400,404 (1965); Douglas v Alabama, 380 U.S. 415, 418 (1965). Denial of cross examination without waiver is constitutional error of the first magnitude which no showing of want of prejudice could cure. Brookhart v Janis, 384 U.S. 1,3-4 (1966). To forbid rudimentary threshold inquiry is effectively to emasculate the right of cross-examination itself. Smith v Illinois, 390 U.S. 129,

131 (1968). The right of cross examination includes the right to question a co-defendant who testifies in his own behalf. United States v Zambrano, 421 F.2d 761 (3d Cir. 1970); Parker v United States, 404 F.2d 1193, 1196 (9th Cir. 1968), cert. denied, 394 U.S. 1004 (1969); Stanley v United States, 245 F.2d 427,433 (6th Cir. 1957); Brown v United States, 56 F.2d 997,999 (9th Cir. 1932). Although a trial judge has undoubted discretion in determining the proper scope of cross-examination, where inquiry into a relevant area has been unduly restricted, reversal must follow. United States v Fowler, 465 F.2d 664 (D.C. Cir. 1972); United States v Wolfson, 437 F.2d 862,874-76 (2d Cir. 1970); United States v Padgent, 432 F.2d 701 (2d Cir. 1970); United States v Greenberg, 423 F.2d 1106 (5th Cir. 1970); United States v Ketchem, 420 F.2d 901 (4th Cir. 1969); United States v Kartman, 417 F.2d 893 (9th Cir. 1969); Beaudine v United States, 368 F.2d 417, 421 (5th Cir. 1966); Dixon v United States, 333 F.2d 348 (5th Cir. 1964); United States v Standard Oil Co., 316 F.2d 884,892 (7th Cir. 1963).

In the instant case, as in Zambrano, supra, it is difficult "to indicate with certainty what it was that prompted the above ruling by the trial court." 421 F.2d at 762. The question propounded of Yagid by trial counsel for Badalamente was clearly relevant and material to the issues to be determined by the jury with respect to the latter. In view of the length and breadth of Yagid's direct examination, including testimony about Badalamente and the March 23 meeting (T.Tr. 377-379,461-463), it could hardly be claimed that the excluded question was beyond the scope of the direct examination. Compare, United States v Lewis, 447 F.2d 134,139-40 (2d Cir. 1971) with United States v Minuse, 142 F.2d 388,389 (2d Cir.), cert. denied, 323 U.S. 716 (1944). And obviously, in view of the fact that it was the first and only question propounded on cross examination of any party, it could not have been cummulative or repetitious, United States v Crosby, 294 F.2d 928,944 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962). Nor is this a case where cross examination was properly curtailed by legitimate security considerations, United States v Marti, 421 F.2d

1263,1266 (2d Cir. 1970); United States v Baker, 419 F.2d 83, 87 (2d Cir. 1969), cert. denied, 397 U.S. 976 (1970). Nor can the fact that Mr. Nigrone failed to pursue the inquiry after the objection was sustained be considered a waiver or acquiescence. See Zambrano, supra, 421 F. 2d at 763. This is particularly true in view of the issue of inadequate assistance of counsel due to conflict of interest. Here, Mr. Nigrone was attempting to cross examine the client of his partner, Mr. Rao. It is small wonder that Mr. Nigrone questioned Yagid with a powder puff rather than a slingshot.

Given the exceedingly narrow case against Badalamente, it was obviously relevant and material for the jury to know from Yagid, who had admitted his own involvement in the conspiracy, whether Badalamente was his partner in the passbook scheme. This was particularly true in view of the testimony of both Olsberg and Yagid that Badalamente had participated in the earlier,legitimate real estate transaction. Denial of cross examination of Yagid as to this fact kept from

the jury relevant and important information which was crucial to a determination of Badalamente's guilt or innocence. In the circumstances of this case, it was reversible error for the district court to restrict trial counsel from pursuing this legitimate line of inquiry.

B. The Court's Charge with Respect to Badalamente was Non-Existent.

The court's charge (58a-93a) focused entirely on the entrapment-withdrawal defense of Yagid and Stern and did not advise the jury that the defense was not applicable to Badalamente and that his defense was non-participation in the conspiracy and lack of criminal knowledge. Although Mr. Nigrone did not request such an instruction, the failure of the district court to charge the jury on the relevant issues which it should determine as to Badalamente and to differentiate them from those relative to the co-defendants was, in the circumstances of this case, plain error.

In the instant case, the district court astonishingly failed and neglected to fulfill its duty to explain fully the law of the case and to bring into view the relations of the particular evidence adduced to the particular issues involved. Bird v United States, 180 U.S. 356, 361 (1901). Here, just as in every criminal trial, the jury's ability to draw appropriate conclusions from the testimony depended upon a discharge of the judge's responsibility to give it the required guidance by a lucid statement of the relevant legal criteria. Bollenbach v United States, 326 U.S. 607, 612 (1946). It is elementary that a defendant is entitled to have presented instructions relating to every theory of defense for which there is any foundation in the evidence. Strauss v United States, 376 F.2d 416, 419 (5th Cir. 1967); Perez v United States, 297 F.2d 12, 15-16 (5th Cir. 1961).

Although the court fully charged the jury with respect to the entrapment-withdrawal defense being offered by Yagid and Stern (85a-89a), it failed to instruct it as to the separate, distinct, and

conflicting defense of non-involvement offered by Badalamente and to differentiate the latter's defense from the former's. In view of the sparse evidence against Badalamente and the ineffectual summation given by his trial counsel, the trial court had a clear duty to focus the issues for the jury as to him and to distinguish them from the totally different and inconsistent issues as to Yagid and Stern.

This was particularly necessary in light of the unobjected-to remarks of both Mr. Rao and the government injecting Badalamente's name into the defense of the other defendants. (T. Tr. 264, 303, 305, 306, 307, 540, 553, 564, 571, 575, 577-78, 579, 586). Yet, the court's charge was devoid of any mention of Badalamente's defense. In essence, the court's charge as to Badalamente was tantamount to no charge at all.

Failure of the trial court to instruct the jury on all essential questions of law involved in a trial, whether requested or not, can constitute "plain error" within the meaning of F.R. Cr. P. 52(b). Screws v United States, 325 U.S. 91, 107 (1945); United States v Thomas, 459 F.2d 1172, 1176-77 (D.C. Cir. 1972); United States v. Wharton, 433 F.2d 451, 456-461 (D.C. Cir. 1970); United States v. Krosky, 418 F.2d 65,66-68 (6th Cir. 1969); Mullins v United States, 382 F.2d 258,262 (4th Cir. 1967); United States v Griffin, 382 F.2d 823, 829 (6th Cir. 1967); Doyle v United States, 366 F.2d 394, 401 (9th Cir. 1966); Tatum v United States, 190 F.2d 612, 615 (D.C. Cir. 1951). That the failure to charge fully and completely as to Badalamente constitutes a defect "affecting substantial rights" is particularly evident in view of the conflict of interest issue presented in Point Two hereof. It was, in actuality, a direct result of the close relationship between the two trial counsel that Mr. Nigrone failed to argue, and to request the court to charge, that Badalamente did not invoke the entrapment-withdrawal defense, but instead denied his

participation in the conspiracy. In view of the particular circumstances here presented, invocation of the plain error doctrine is called for.

Summary

The district court improperly limited relevant and material cross examination of Yagid by Badalamente's trial counsel and committed plain error in failing to differentiate the entrapment-withdrawal defense of Yagid and Stern from the non-involvement defense of Badalamente. These errors, taken together with and arising directly out of the conflict of interest issue, require the granting of a new trial. Therefore, even if the court finds the evidence sufficient to sustain the jury's verdict, the cause should be remanded for a new trial.

Conclusion

Because the evidence failed to show appellant's knowledge of the illegal aims of the conspiracy and his membership in it, as well as the specific intent required to commit the substantial offense, his conviction for conspiracy should be reversed and judgment of acquittal should be entered.

Alternatively, even if this court were to hold that the evidence was legally sufficient, appellant should be granted a new trial because the conflict of interest deprived him of the adequate assistance of counsel, as a direct result of which the district court committed reversible error in precluding relevant cross-examination of a co-defendant and plain error in failing to define to the jury the defense raised by appellant and to differentiate it from that of the co-defendants.

As to the issue of inadequate assistance of counsel due to conflict of interest, if the court finds it impossible to determine the question on the present

state of the record, appellant requests the court to remand the cause to the district court for a hearing but to retain jurisdiction of this appeal.

New York, New York
June 7, 1974

Respectfully submitted,

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

SARA STEINGART, being duly sworn, deposes and says: that she is over the age of 18 years and not a party to this action; that on the 7th day of June, 1974, she served a true copy of the within Brief and Appendix of Appellant, Badalamente, on Clerk, United States Court of Appeals, 2nd Circuit, Foley Square, N.Y.N.Y. 10007; United States Attorney Southern District of New York, Foley Square, New York, N.Y., N.Y. 10007 and Criminal Appeals Bureau, Legal Aid Society, Foley Square, New York, New York 10007 by depositing the same properly enclosed in a securely sealed, postpaid wrapper in a United States Post Office located at Grand Central Station, New York, New York, directed to above parties at the above addresses all within the borough of Manhattan, City of New York, that being their addresses within the State designated for that purpose upon the preceding papers in this action, or the place where they keep an office between which places there then was and now is a regular communication by mail.

Sara Steingart
SARA STEINGART

SWORN TO BEFORE ME THIS

7th Day of June, 1974.

James Fennig

Notary

NOTARY PUBLIC, STATE OF N.Y.
QUAL. IN WEST County